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Supranational action against sex discrimination: Equal pay and equal treatment in the European Union

Ingeborg HEIDE*

The vision of a united Europe took its initial shape more than four decades ago, with the Treaty of Rome. Many of the original expectations of greater prosperity, social justice and lasting peace, as expressed in that Treaty, have materialized. This was possible because, from the start, the Community was designed not as a static concept but as a dynamic one, open to changes through amendments to the Treaty of Rome — its primary source of law — and through secondary legislation. Developed in this context, European equality law has had a strong impact on the national legal systems of Member States. Indeed, it shares the unique supranational character of all European law. All workers in all Member States, including the French overseas departments, the Azores, Madeira, Gibraltar and the Canary Islands, can rely on it. European equality law is also applicable to employment outside the Union if both parties to the employment relationship reside in the Union and the discriminatory act took place in the Union. Its scope may be further broadened as prospective new members of the Union — Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia — transpose into their systems the *acquis communautaire*, i.e. the body of common rights and obligations that apply to all Member States.

Yet neither the general public nor even legal specialists are widely familiar with European equality law. Lack of awareness of its concepts and scope has been identified as a major reason for the relative scarcity of equality litigation.[1] Individual employees display very little knowledge of the rights it affords them, especially in respect of the less transparent forms of inequality, like indirect

* Bureau for Gender Equality, ILO, Geneva; seconded from the German Federal Ministry of Labour.

[1] See Judith Blom, Barry Fitzpatrick, Jeanne Gregory, Robert Knegt and Ursula O'Hare: *The utilisation of sex equality litigation procedures in the Member States of the European Community: A comparative study*, V/782/96-EN, Brussels, European Commission, 1995; on national litigation procedures, see also Barry Fitzpatrick, Jeanne Gregory and Erika Szyszczak: *Sex equality litigation in the Member States of the European Community: A comparative study*, V/407/94-EN, Brussels, European Commission, 1993.

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discrimination. But developments in the past few years testify to an enhanced conviction that "Europe matters". The number of equality cases referred to the European Court of Justice (ECJ) for preliminary rulings has been rising consistently. These proceedings are a test of the interpretation of European law in individual cases pending before the national courts. Judges, lawyers and other experts have obviously become more conscious that European law might count in such cases, although the extent to which this is reflected in actual practice varies between the Member States.[2] In 1999, as many as 23 preliminary rulings were pending, with Germany and the United Kingdom in the lead, accounting for 11 and six cases respectively.[3]

This article aims to show how European law has helped to promote equality between women and men. It opens with an outline of the development and operation of the relevant European instruments, to set equality law in its broader, historical context of European social policy, legislation, application and law enforcement. A selection of the ECJ's case law is then presented, with a focus on equal pay and equal treatment at the workplace.[4] European equality law being such a vast legal field, other important areas are left aside, either because they deserve separate treatment or because they are covered by recent instruments which have not yet entered into force or not gained sufficient practical relevance. Thus, parental leave and part-time work, aiming at gender equality in a broader sense, will be addressed only briefly. Legislation and case law on occupational and statutory social security systems are touched upon only in the context of equal pay.[5] And maternity protection is discussed only in connection with legislative procedures and direct discrimination.

[2] For a comparative overview of equality cases from the different Member States, see European Commission: *Equal opportunities for women and men in the European Union – Annual Report 1996*, CE 98-96-566-EN-C, Luxembourg, Office for Official Publications of the European Communities, 1997, p. 109.

[3] See *Equality Quarterly News* (http://europe.eu.int/comm/dg05/equ_opp/index_en.htm), No. 1/99, Winter 1999.

[4] The judgements of the European Court of Justice have often provoked fierce debates, with a correspondingly vast number of publications. In view of the large quantity of secondary literature published in all Member States, the citations in this article are mostly restricted to original or comparative sources and easily accessible publications from European Union institutions. The most comprehensive list of publications is probably the *Legal bibliography of European integration*, Luxembourg, Office for Official Publications of the European Communities (since 1981); for an excellent selection of publications in the social and equality fields, see Hans Von der Groeben, Jochen Thiesing and Claus-Dieter Ehlermann (eds.): *Kommentar zum EU-/EG-Vertrag*, Baden-Baden, Fünfte neubear beitete Auflag, 1999, pp. 3/903-3/915 and pp. 3/1192-3/1198. See also *Women's rights and the Maastricht Treaty on European Union* and *Women's rights and the Treaty of Amsterdam*, Working Papers of the European Parliament, Women's Rights Series, No. 10/94 and No. 5/98, respectively, and, more generally, http://europe.eu.int/comm/dg05. The ECJ cases discussed in this article are indexed and summarized in European Commission: *Handbook on equal treatment for women and men in the European Union*, Second edition, Luxembourg, Office for Official Publications of the European Communities, 1999. Additional information on the ECJ is available at http://curia.eu.int/en.

[5] See, for instance, Karl-Jü rgen Bieback: *Indirect sex discrimination within the meaning of Directive (CE) 79/7 in the social security law of the EC Member States*, V/1333/96-EN, Brussels, European Commission, 1996.

From Rome to Amsterdam: From economic to social Europe

In a strict legal sense, the European Union is the body established by the Treaty on European Union. It is a body without precedent in history whose status is still not clearly and fully defined. Though not a state in itself, it is a *supranational* body "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (Article 6(1) EU).[6] It is vested with its own sovereignty, legislative powers, jurisdiction and law-enforcement mechanisms. In many areas, however, its action remains subject to the agreement of the Member States. Its institutions consist of the following: a Commission, which proposes and monitors European law; a Council, with legislative powers, composed of national ministers; a European Parliament;[7] a Court of Justice; and a Court of Auditors. Central to the Union's operation is the Treaty establishing the European Community, which governs its legislative and law-enforcement functions.

Legislative background and framework

The Treaty of Rome,[8] which established the European Economic Community, focused on the creation of the single market and related social issues. Because not all parties agreed on a stronger commitment to a *social* Europe, "only" the European *Economic* Community was established initially. The Treaty's chapter on social policy thus represented a compromise between the main opponents on this question, Germany and France, the latter being in favour of an enhanced social commitment.[9] However, Article 117 EEC Treaty (now Article

[6] In the absence of a uniform system of citation, the system followed here is that set out by the European Court of Justice (ECJ) in ECJ Press Release No 57/99 of 30 July 1999 (http://curia.eu.int/en/cp/index.htm). Accordingly, reference to articles as they stood before 1 May 1999 (when the Treaty of Amsterdam entered into force) is made by " EU Treaty", "EEC Treaty" or "EC Treaty", whereas "EC" or "EU" denotes articles as they stand since that date. One of the amendments introduced by the Treaty of Amsterdam was to renumber the articles, titles and sections of the Treaty on European Union and the Treaty establishing the European Community. Treaty articles cited in the following pages are numbered according to the new consolidated version of the Treaty of Amsterdam, unless reference is made to an earlier version. The equivalences between the two numbering systems are given in most cases. References to "the Treaty" should be understood to mean the founding Treaty of Rome as amended at the relevant time.

[7] Because of its basically passive role, the European Parliament cannot be regarded as a true legitimating body for the European Union; its position was further strengthened through the Treaty of Amsterdam, but it still has no power to initiate legislation.

[8] The Treaty establishing the European Economic Community was concluded by Belgium, Germany, France, Italy, Luxembourg and the Netherlands on 25 March 1957; it entered into force on 1 January 1958.The Community was later enlarged with the accession of Denmark, the United Kingdom and Ireland (1973), Greece (1981), Spain and Portugal (1986), Austria, Finland and Sweden (1995).

[9] On the history of the social chapter, see Hans Von der Groeben, Jochen Thiesing and Claus-Dieter Ehlermann (eds.), op. cit. (note 4), p. 3/926-3/986.

136 EC) made it clear that social progress was primarily expected to be a side effect of economic growth. Any related legislation was to take place under other, specific provisions of the Treaty, e.g. that on the free movement of workers.[10] Legislation on further social matters was envisaged only as a third and last resort.[11] The conflict of opinions over social policy lingered and has dominated all negotiations on amendments to the Treaty and on legislation, including in the field of equality. As a result, the authority of the European Community over social matters has remained limited, with all legal acts requiring competence based upon an article of the Treaty and observance of the principle of subsidiarity as laid down in Article 3b EC Treaty (now Article 5 EC). Yet, despite the general reluctance to pursue common social policies, a crucial provision on equal pay for equal work was incorporated into the original Treaty itself: Article 119 EEC Treaty (now Article 141 EC).

Though part of the Treaty's social chapter, this provision was not included with a view to promoting social justice. Rather, the reason was that some of the founding Members had already ratified the ILO's Equal Remuneration Convention, 1951 (No. 100),[12] which calls for "equal remuneration for work of equal value" (Article 2). Of these, France, in particular, feared a competitive disadvantage for its industries and insisted on the inclusion of such a clause.[13] In its later rulings, however, the European Court of Justice (ECJ) attached great importance to this provision, highlighting its social objectives despite this history.[14]

During its first three decades, the Community thus concentrated on the creation of its internal market, with social policy generally relegated to a minor role. Important legislation on equal pay and equal treatment in employment, as well as in state and occupational social security schemes, was none the less adopted in the 1970s and 1980s. And as market liberalization made progress, the conviction gained ground that the legislative process should be facilitated and the influence of the European Parliament strengthened. In response to the changing economic, political and social environment, the Treaty was amended three times to facilitate, deepen and widen Community policies.[15] This process was first launched in a field which is closely linked with production costs: safety and health at the workplace. The Single European Act (SEA) of 1987[16] introduced the possibility of adopting minimum standards to improve the work-

[10] See Article 39 EC (ex Article 48 EEC Treaty).

[11] See Article 117 (2) EEC Treaty.

[12] Belgium had ratified this Convention on 23 May 1952, France on 10 March 1953, and Germany and Italy on 8 June 1956.

[13] See Hans Von der Groeben, Jochen Thiesing and Claus-Dieter Ehlermann (eds.), op. cit. (note 4), pp. 3/1207 et seq.

[14] Since its famous *Defrenne II* ruling on Case 43/75, ECR 1976, p. 455 (see below).

[15] For further information see Emil J. Kirchner: "The social framework of the European Union", in *European Union Encyclopaedia and Directory 1996*, Second edition, London, Europa, 1996, pp. 140-144.

[16] Concluded on 17 February 1986, in force since 1 July 1987, OJ L/169, 29.6.1987.

ing environment by majority vote in the Council — whereas unanimity was formerly required in all social matters — and in cooperation with Parliament.[17] This paved the way for the adoption of Directive 92/85/EEC on maternity protection.

In December 1989, all Member States except the United Kingdom made a policy statement in the Community Charter of the Fundamental Social Rights of Workers, emphasizing that the single market must benefit workers as well as employers. Though not legally binding, the Charter represented a political commitment to further codification on a number of issues including equality between women and men and family responsibilities. This was followed up by the Social Policy Agreement (SPA) annexed to the 1992 Treaty of Maastricht,[18] which significantly amended the Treaty of Rome and renamed it "Treaty establishing the European Community" (EC Treaty). In particular, the EC Treaty introduced a new legislative mechanism of *co-decision*[19] that strengthened the Parliament's influence on legislation, though this did not yet apply to social policy. The SPA, however, extended the scope of qualified majority voting beyond occupational health and safety to include hitherto contentious policy issues such as equality between men and women regarding labour market opportunities and working conditions. Legislation on social security and social protection, though, remained subject to unanimity in the Council, acting in consultation with Parliament. Social dialogue was strengthened through a unique procedure involving the social partners in the legislative process.[20] Under Article 6 of the SPA, Member States were allowed to maintain or adopt "measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers". This, however, did not prevent the European Court of Justice from setting strict limits to affirmative action in the important Kalanke case (see below).

With the entry into force of the Treaty of Amsterdam[21] in May 1999, these provisions were written into the revised Chapter on Social Provisions of

[17] Under this procedure, the European Parliament is consulted twice and can reconsider decisions after the Council of Ministers has reached a "common position". See Article 118a EEC Treaty (now Article 138 EC) and Article 189c EEC Treaty (now Article 252 EC).

[18] Treaty on European Union, signed in Maastricht on 7 February 1992, in force since 1 November 1993. Because the United Kingdom was not a party to the SPA, the Agreement was mostly regarded as an instrument of international, not supranational, character.

[19] See Article 189b EC Treaty (now Article 251 EC): this procedure enables the EP and the Council to make laws jointly in specific policy areas; the EP can, by absolute majority, eliminate proposals in these areas.

[20] This procedure considerably speeded up the adoption of directives on parental leave (96/34/EC) and on part-time work (97/81/EC). On these instruments in international perspective, see, respectively, "Parental leave", in *International Labour Review* (Geneva), Vol. 136 (1997), No. 1, pp. 109-128; and "Part-time work: Solution or trap?", in *International Labour Review* (Geneva), Vol. 136 (1997), No. 4, pp. 558-579.

[21] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, signed at Amsterdam, 2 October 1997, in force since 1 May 1999, OJ 97/C 340/01.

Box 1. Equality legislation in the European (Economic) Community

Council Directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women **(75/117/EEC)** — OJ L 45, 19.2.1975

Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions **(76/207/EEC)** — OJ L 39, 14.2.1976

Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security **(79/7/EEC)** — OJ L 6, 10.1.1979

Council Directive of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes **(86/378/EEC)** — OJ L 225, 12.8.1986 — amended by the Directive of 20 December 1996 **(96/97/EC)** — OJ L 46, 17.2.1997

Council Directive of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood **(86/613/EEC)** — OJ L 359, 19.12.1986

Council Directive of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 81/391/EEC) **(92/85/EEC)** — OJ L 348, 28.11.1992

Council Directive of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC **(96/34/EC)** — OJ L 145, 19.6.1996 — and Council Directive of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC **(97/75/EC)** — OJ L 10, 16.1.1998

Council Directive of 15 December 1997 on the burden of proof in cases of discrimination based on sex **(97/80/EC)** — OJ L 14, 20.1.1998

Council Directive of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC **(97/81/EC)** — OJ L 14, 20.1.1998.

the Treaty establishing the European Community.[22] Positive discrimination in working life is now recognized — though its limits are still to be tested — in the fourth paragraph of Article 141 EC. Its third paragraph provides the Community with its own legal basis for adopting "measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value", by majority vote of the Council acting in co-decision with Parliament. Article 13 EC, as amended, sets out a procedure for adopting measures against discrimination in areas other than employment, including legislation to combat discrimination linked with sexual orientation. A more solid, more extensive and more democratic legal basis for action has thus been established.

[22] Articles 136 et seq. EC; for further information see Berndt Schulte: "Juridical instruments of the European Union and the European Communities", in Wolfgang Beck, Laurent van der Maesen and Alan Walker (eds.): *The social quality of Europe*, The Hague, Kluwer Law International, 1997, p. 45-67; and Suzanne Berthet: *L'Union Européenne et l'Organisation internationale du Travail*, Lyon, Université Jean Moulin/Lyon III, 1997.

Application and enforcement of European equality law

How European legislation is applied depends on its form and content. Ratification is required for the basic Treaties of Rome, Maastricht and Amsterdam,[23] but not for legislation made thereunder — i.e. regulations and directives. While regulations are directly applicable, without requiring any further action at the national level, directives are binding on all Member States only with respect to their objectives (see Article 249 EC/ex Article 189 EEC Treaty). Thus each individual state may, in principle, freely decide on how to apply a directive; and states obviously have an interest in using their own administrative structures and keeping the monitoring in their own hands. All legal instruments in the field of equality between women and men have been adopted in the form of directives.

All equality directives impose on the Member States the duty to ensure that any statutory, regulatory or contractual provisions at variance with equality principles be removed, that an effective judicial system be in place, that workers be informed of their rights, and that they not be victimized for upholding their rights. Accordingly, laws and regulations must be scrutinized, amended and/or enacted to comply with the aims of each directive. This legislative process involves government, parliament, heads of state and often also the social partners and other civil-society organizations, which is why all directives determine a time frame for their implementation and a further period for submission of national reports thereon. These periods vary: for the Equal Pay Directive (75/117/EEC), the period for compliance was one year[24] with a further two years for the submission of national reports; the Equal Treatment Directive (76/207/EEC) allowed 30 months, plus two additional years for reporting, and the Directive on Equal Treatment in Statutory Social Security (79/7/EEC), six years and one additional year, respectively. If a state fails to transpose a directive into its national law in time, individual claimants cannot avail themselves of its provisions directly, though the state at fault is then liable for compensation. In *Francovich and Bonifaci v. Italian Republic*, the Court made the following ruling:

> 1. The provisions of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employers, which defines employees' rights, must be interpreted as meaning that interested parties may not assert those rights against the State in proceedings before the national courts in the absence of implementing measures adopted within the prescribed period.

[23] Sometimes referred to as the "Founding Treaties", these instruments are of *inter*national, not *supra*national, character.

[24] When this directive was adopted, the transition period for Article 119 EEC Treaty on equal pay (now Article 141 EC) had come to an end more than 13 years earlier; the reluctance of the Commission to enforce its implementation in the meantime gave rise to very critical comments by the ECJ in the case *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne II)*, ECR 1976, p. 455.

> 2. A Member State is obliged to make good the damage suffered by individuals as a result of the failure to implement Directive 80/987/EEC (Cases C-6/90 and C-9/90, ECR 1991, p. I-5357).[25]

In its later judgements on *Dillenkofer and Others v. Federal Republic of Germany*,[26] the Court confirmed state liability for failure to implement a directive under three conditions: (a) the result prescribed by the directive must entail the grant of rights to individuals; (b) the content of those rights must be identifiable on the basis of the provisions of the directive; and (c) there must be a causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

In *Grimaldi v. Fonds des Maladies Professionnelles*, the Court ruled that even recommendations of the Commission must be taken into account for the interpretation of Community law:

> In the light of the fifth paragraph of Article 189 of the EEC Treaty, the Commission Recommendation of 23 July 1962 concerning the adoption of the European Schedule of industrial diseases and Commission Recommendation 66/462 of 20 July 1966 on the conditions for granting compensation to persons suffering from occupational diseases cannot in themselves confer rights on individuals upon which the latter may rely before national courts. However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law (Case C-322/88, ECR 1989, p. 4407).

This view may have motivated the judges of the High Court of Catalonia to set a precedent by referring to the Commission's *Code of practice to combat sexual harassment*. They held that "repeated jokes of bad taste with sexual connotations", as interpreted by the Commission as sexual harassment, constituted grave misconduct on the part of the worker which justified his dismissal.[27] This case law may likewise become relevant for other "soft law", such as the Commission's *Code of conduct concerning the implementation of equal pay for women and men for work of equal value*.

Under Article 6 of the Equal Treatment Directive — and similar provisions in the other directives — all Member States are required to "introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment ... to pursue their claims by judicial process after possible recourse to other competent authorities". The meaning of this Article was at issue in *Johnston v. Chief Constable of the Royal Ulster Constabulary*.[28] This case dealt with a national-law provision invoked by the defendant to substanti-

[25] See also Cases C-46/93 and C-48/93, *Brasserie du Pêcheur,* ECR 1996, p. I-1029.

[26] Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, ECR 1996, p. 4845.

[27] See *Equality Quarterly News* (http://europe.eu.int/comm/dg05/equ_opp/index_en.htm), No. 1/99, Winter 1999, p. 35.

[28] Case 222/84, ECR 1986, p. 1651.

ate an exception from the general prohibition of discrimination which was not reviewable by any court or other independent body. In its ruling, the ECJ stressed that access to justice was a principle common to the constitutional traditions of the Member States, which were also addressed in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1951, so that all persons who felt discriminated against must be able to obtain judicial recourse and effective remedy in a court or tribunal.

Only employees of Community institutions can involve the ECJ *directly* for discrimination in their employment relationship.[29] Normally, individual litigation takes place in the national judicial systems, under national rules and procedures. But the national courts are bound to observe European law and to interpret national law accordingly. The *preliminary rulings* of the ECJ are meant to ensure that Community law is interpreted consistently throughout the Union.

> The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
> (a) the interpretation of this Treaty;
> (b) the validity and interpretation of acts of the institutions of the Community ...
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice (Article 234 EC/ ex Article 177 EC Treaty).

National courts thus have the option or, in the last instance, the obligation to refer to the European Court of Justice (ECJ), whenever European law might be relevant to a particular case. Non-observance of this duty constitutes a breach of Community law which may lead to *infringement* proceedings against the State concerned. The questions referred to the Court, as well as its responses, usually take the form of an abstract "dialogue between judges". The Court's interpretation of Community law must then be applied to the case in point by the national court when it takes its final decision.

Besides its legislative and executive functions, the European Commission also plays an important part in supervising the implementation of Community law on the basis of national reports, petitions or other information. The Commission may bring a case of non-compliance before the ECJ where a state fails to comply, within a prescribed period, with a *reasoned opinion* delivered by the Commission after the state concerned has been given the opportunity to submit its observations.[30] Such proceedings can also be initiated by other Member States.[31]

[29] See Article 236 EC (ex Article 179 EC Treaty); Article 230 EC (ex Article 173 EC Treaty), paragraph 4, allows direct litigation under certain conditions, but it does not apply to directives, which are addressed to the Member States.

[30] See Article 226 EC (ex Article 169 EEC/EC Treaty).

[31] See Article 227 EC (ex Article 170 EEC/EC Treaty).

If the Court finds that a state has failed to fulfil an obligation, the state in question is required to take the necessary measures to comply with the judgement. The Commission can again institute infringement proceedings if it considers the measures taken as insufficient, and request that the Court impose a lump sum or penalty payment. It did so this year in the case of France, for non-implementation of an earlier judgement on the ban of nightwork by women.[32] The Court has dealt with infringement cases against Belgium,[33] Denmark,[34] Germany,[35] Greece,[36] France,[37] Italy,[38] Luxembourg[39] and the United Kingdom.[40] Only recently, the Commission initiated a number of proceedings for failure to transpose Directives 92/85/EC, 96/34/EC and 96/97/EC.[41]

Primarily aimed at bringing national law into line with Community law, infringement proceedings account for a relatively small share of the Court's equality case law, compared to more than 100 preliminary rulings. Indeed, most problems are corrected and settled during the pre-judicial phase.[42] Yet infringement cases, though not significant in numbers, are of great political importance. The mere possibility of action against a Member State, combined with the threat of compensation and penalties, have certainly promoted observance of Community law and pushed equality issues higher on the national agendas.

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[32] See Article 228 EC (ex Article 171 EEC/EC Treaty) and http://europe.eu.int/comm/dg05/equ_opp/news/i nfring_en.htm.

[33] Case C-229/89, *Commission of the European Communities v . Kingdom of Belgium* , ECR 1991, p. I-2205, on Directive 79/7/EEC; Case C-173/91, ECR 1993, p. I-673, on Directive 76/207/EEC and 119 EEC Treaty (now Article 141 EC).

[34] Case 143/83, *Commission of the European Communities v. Kingdom of Denmark,* ECR 1985, 427, on the transposition of Directive 75/117/EEC.

[35] Case 248/83, *Commission of the European Communities v. Federal Republic of Germany*, ECR 1985, p. 1459, on transposition of Directive 75/117/EEC.

[36] Case C-187/98, *Commission of the European Communities v. Hellenic Republic,* OJ/C 258/18, on Directives 75/117/EEC and 79/7/EEC (pending).

[37] Case 312/86, *Commission of the European Communities v. French Republic*, ECR 1988, p. 6315, on transposition of Directive 76/207/EEC; Case 318/86, ECR 1988, p. 3559, on access to posts in public service under the same Directive; Case C-197/96, ECR 1997, p. I-1489, on prohibition of night work under the same Directive; Case C-354/98, OJ 98/C 340/24, on Directive 96/97/EC, judgement of 8 July 1999 (nyr) (see http://curia.eu.int/en).

[38] Case 163/82, *Commission of the European Communities v. Italian Republic,* ECR 1983, p. 3273, on transposition of Directive 76/207/EEC; Case C-207/96, ECR 1997, p. I-6869, on prohibition of night work under the same Directive.

[39] Case 58/81, *Commission of the European Communities v . Grand Duchy of Luxembourg* , ECR 1982, p. 2175, on Directive 75/117/EEC (transposition); Case C-438/98, OJ 98/C 20/28, on transposition of Directive 96/97/EC (pending).

[40] Case 61/81, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, ECR 1982, p. 2601, on transposition of Directive 75/117/EEC; Case 165/82, ECR 1983, p. 3431, on transposition of Directive 76/207/EEC.

[41] For details see *Equality Quarterly News* (http://europe.eu.int /comm/dg05/equ_opp/index_en.htm), No. 1/99, p. 9.

[42] See *Equality Quarterly News,* No 4/98 (CE-V/2-98-019-EN-C), p. 20 et seq.

The European Court of Justice's rulings on equal pay

ECJ rulings share the supranational character of European legislation. They are directly binding and must be applied throughout the European Union. Some 120 Court rulings have dealt with equality matters. Although the nature of case law implies that there is no systematic and continuous development, the Court has generated remarkable principles of interpretation which will be presented in the following sections.

Equal pay for men and women — a fundamental workers' right

> 1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
> 2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
> Equal pay without discrimination based on sex means:
> (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
> (b) that pay for work at time rates shall be the same for the same job.
> 3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.
> 4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. (Article 141 EC/ex Article 119 EC Treaty).

The original version of Article 119 EC Treaty covered only the right to equal pay for *equal work*. But Article 1 of the Equal Pay Directive (75/117/EEC) subsequently broadened this concept to include equal pay *for work to which equal value is attributed*. The Treaty of Amsterdam finally amended the wording of Article 119 EC Treaty accordingly (now Article 141 EC, as reproduced above). This broader approach may require the introduction of a suitable job classification scheme to enable individuals to obtain recognition of equivalence. Yet in an infringement case (61/81) against the United Kingdom, where the introduction of a job classification system was left to the employer's discretion,[43] the Court regarded national legislation as being at all events contrary to European law if it failed to provide for an appropriate authority before which workers could claim that their work had the same value as other work in the event of disagreement.

[43] See note 40 above.

Roughly one-third of ECJ equality cases have dealt with pay equality under Article 119 of the Treaty (now Article 141 EC) and Directive 75/117/EEC. As early as 1976, the Court's ruling on the *Defrenne II* case paved the way for dynamic evolution. Ms. Defrenne worked as a stewardess for the Belgian airline Sabena from 1951 to 1968. While she was so employed, female stewardesses received a lower salary than did male cabin stewards. In 1968, her contract was terminated under a clause which provided that women should cease to be members of the air crew on reaching the age of 40. Ms. Defrenne first sued the Belgian State for "equal pay", on grounds of discrimination under the applicable statutory retirement pension scheme.[44] She later challenged Sabena on the pay differential during her employment,[45] and then claimed compensation for loss of earnings after her dismissal.[46] All three cases were referred to the ECJ for interpretation.

The Court dealt with the question of the retirement pension in *Defrenne I*, concluding that Article 119 of the Treaty was not applicable to payments under state pension schemes (Directive 79/7/EEC, which covers such schemes, was not yet adopted). Ms. Defrenne's compensation claim for sex discrimination linked with her dismissal (*Defrenne III)* was also rejected: Article 119 of the Treaty does not cover elements other than pay, and Directive 76/207/EEC (on equal treatment) did not yet exist in 1968. Her second claim, concerning the pay differential during her employment (*Defrenne II*), was successful.

In this case of paramount importance, the parties had agreed that the work of an air hostess was identical to that of a cabin steward so that pay discrimination was no longer disputed. The main legal problem was that she had been employed from 1951 to 1968, before Directive 75/117/EEC was adopted, and that Belgian legislation guaranteeing equal pay did not yet exist.

The specific issues to be resolved included the following: Could Article 119 of the Treaty serve directly as a legal basis for pay claims? Could it be invoked by individuals not only against the State but also — in connection with collective agreements and contracts — between individuals? Did it matter that the European Commission had not pursued further the application of the principle of equal pay enshrined in the Treaty? What were the criteria to be applied in determining "equal" pay if the relevant conditions were null and void because of their discriminatory nature? Could a pay claim be made for a past period and, if so, for which period? Would all workers in a similar situation be entitled to retroactive payments? This last question in particular raised serious concern, and the Member States pleaded for retroactive validity to be restricted to pending cases at the most.

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[44] Case 80/70, *Defrenne v. Belgian State (Defrenne I)*, ECR 1971, p. 445.

[45] Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne II),* ECR 1976, p. 455.

[46] Case 149/77, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena (Defrenne III)*, ECR 1978, p. 1365.

The Court stated that, because of its distinct and fundamental character, Article 119 of the Treaty had *direct vertical and horizontal effects*. In other words, it could be invoked for claims against private employers before the national courts as well as against the State "in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public". From the Member States' commitment to improve living and working conditions under Article 117 EEC Treaty (now Article 136 EC), the Court reasoned that the persons discriminated against should receive higher pay aligned on that of the reference group (i.e. no "levelling down"). The right to equal pay was granted from 1 January 1962 in the founding countries and from the time of accession to the Community in other countries. Due to overriding considerations of legal certainty, however, the ruling's retroactive effects were limited to persons who had already taken steps to safeguard their rights. Others are entitled to retroactive payments from 8 April 1976, i.e. the date of the *Defrenne II* judgement. A similar limitation was later introduced into the case law on occupational pension schemes by the 1990 judgement on the *Barber* case.[47]

In all its subsequent judgements concerning equal pay, the Court has made reference to the *Defrenne II* case and based its arguments exclusively or primarily on Article 119 of the Treaty, notwithstanding the more detailed provisions of Directive 75/117/EEC. In the recent past, this Directive has been mentioned as well, but merely as implementing Article 119 and therefore sharing its direct effect. The Court has thus avoided comment on the fact that, in principle, directives do not have direct effect in national law. For this reason also, the scope of Article 119 has been interpreted extensively.

The wide scope of the right to equal pay

Article 141 EC (ex Article 119 EEC/EC Treaty) guarantees equal pay for *work of equal value* and applies not only to ordinary wages or salary *per se*, but also to "any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his [or her] employment from his [or her] employer" — in line with the definition of remuneration in ILO Convention No. 100 (1951). The principle of equality is constructively applicable to: contributions to an occupational pension scheme paid by an employer;[48] payments from such schemes after retirement;[49] temporary payments effected by an employer after cessation of work, such as severance grants; [50] and main-

[47] See note 66 below. For an overview of this and related cases, see also "Occupational pension schemes: Towards perfect equality?", in *International Labour Review* (Geneva), Vol. 132 (1993), No. 4, pp. 440-450.

[48] Case 69/80, *Worringham and Humphreys v. Lloyds Bank Limited,* ECR 1981, p. 767.

[49] Case 170/84, *Bilka-Kaufhaus GmbH v. Weber von Hartz,* ECR 1986, p. 1607; see also note 66 below.

[50] Case C-33/89*, Kowalska v. Freie und Hansestadt Hamburg,* ECR 1990, p. I-2591.

tenance of salary in the event of sickness.[51] Any fringe benefits provided by an employer to former employees — even without legal obligation — are covered as well. In the recent judgement on *The Queen v. Secretary of State for Employment, ex parte Seymour-Smith and Perez*,[52] payments made to compensate for unfair dismissal were also regarded as pay. The Court's wide approach is illustrated by the following examples.

Ms. Garland[53] sued her former employer, British Rail, because although it granted reduced train fares equally to its former male *and* female employees, this benefit extended only to the relatives of male retirees — not to those of the female pensioners. The Court argued that additional benefits that are paid voluntarily after termination of employment fell within the scope of Article 119 of the Treaty, rendering *any* differentiation on grounds of sex illegal.

Similar travel concessions — this time demanded for a homosexual partner — were the subject of a recent ruling on *Grant v. South-West Trains Ltd.*[54] According to the employer's staff regulations, concessionary tickets were granted to an employee's married partner or to a partner of the opposite sex with whom a "meaningful relationship" existed. Ms. Grant claimed the benefit for a female cohabitee, which the employer rejected. In the Court's view, the denial of the benefit was based on sexual orientation, not sex. Discrimination on the basis of sexual orientation was not seen as covered by current European law, though it was highlighted in the judgement that legislation to eliminate discrimination on that basis could be adopted under Article 13 EC once the Treaty of Amsterdam had entered into force. This provides that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

Although *Ms. Murphy*[55] and her 28 female colleagues performed work that required undisputedly *higher* skills than did their male colleagues' work, they were paid *less.* Their claim for the *same* pay was rejected because, in the opinion of the equality officer responsible, the right to equal pay could only be invoked for work of the same value, not for work of superior value. The ECJ, to which the case was referred, pointed out that Article 119 EC Treaty *a fortiori* precluded rejection of the equal pay claim but did not entitle the workers to *higher* pay.

In *Macarthys Ltd v. Smith*,[56] the Court had to deal with the case of a female employee who was paid UK£10 less per week than her male predeces-

[51] Case 171/88, *Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG,* ECR 1989, p. 2743.

[52] Case C-167/97, judgement of 9 February 1999 (nyr), in *Equality Quarterly News* (http://europe.eu.int/com m/dg05/equ_opp/index_en.htm), No. 2/99.

[53] Case 12/81, *Garland v. British Rail Engineering Limited,* ECR 1982, p. 359.

[54] Case C-249/96, ECR 1998, p. I-621.

[55] Case 157/86, *Murphy and Others v. An Bord Telecom Eireann*, ECR 1988, p. 673.

[56] Case 129/79, ECR 1980, p. 1275.

sor, whose post she had taken over after an interval of four months. Here also, the principle of equal pay was applied because it is not confined to situations in which men and women perform equal work *at the same time.*

A similar situation came up more recently in *Levez v. T. H. Jennings (Harlow Pools) Ltd.*[57] In 1991, Ms. Levez had replaced a male employee with an income of UK£11,400 per year; but her remuneration was only UK£10,000. She had been misinformed by the employer as to the salary paid to her predecessor. Furthermore, a national restriction limited the award of pay arrears to two years prior to the commencement of proceedings. Since the application of this provision would have limited her pay claim, the Employment Appeal Tribunal referred the matter for interpretation to the ECJ, which stated that under such circumstances the time limit could not be applied.

Pay issues were also raised recently in the context of pregnancy, maternity and parental leave. *Pedersen and Others v. Fællesforeningen for Danmarks Brugsforeninger and Others*[58] was a case brought by several women employees who had suffered pregnancy-related complications *prior* to the three-month period preceding their expected date of confinement. Danish legislation provided that pregnant women who, due to their pregnancy, were unfit for work before that period, were not entitled to full pay, whereas employees unfit to work because of illness were entitled to full pay. The Court regarded as discriminatory this detriment resulting from a "pathological condition connected with her pregnancy". Two further cases concerned the denial of a Christmas bonus to mothers on reduced working time or parental leave following maternity.[59] Here the Court ruled that a Christmas bonus paid voluntarily or by contractual agreement was to be regarded as "pay" and that the exclusion of part-time workers constituted "indirect discrimination" if a large majority of the workers adversely affected were women. The exclusion of mothers on parental leave was held to constitute indirect discrimination only if the bonus was a reward for past service, as opposed to an incentive for the future — an issue to be determined by the national courts.

Part-time work, occupational pensions and the concept of indirect pay discrimination

In recognizing that certain forms of unfavourable treatment can amount to indirect sex discrimination, the Court has considerably improved the protection afforded to part-time workers. In Europe, part-time workers are far more

[57] Case C-326/96, judgement of 1 December 1998 (nyr), see ECJ Press Release No. 73/98 (http://curia.eu.int/en).

[58] Case C-66/96, judgement of 19 November 1998, (nyr), see ECJ Press Release No. 70/98 (http://curia.eu.int/en).

[59] Cases C-281/97, *Krüger v. Kreiskrankenhaus Ebersberg*, judgement of 9 September 1999 (nyr), in ECJ Press Release No. 60/99; and C-333/97, *Lewen v. Denda* (nyr), in ECJ Press Release No. 82/99; on the legality of section 23a(3) of the Austrian Employee Act, see Case C-249/97, *Gruber v. Silhouette International Schmied GmbH & Co. KG*, judgement of 14 September 1999 (nyr), in ECJ Press Release No. 62/99; see (http://curia.eu.int/en).

likely to be women than men. In 1998 women's share of part-time employment ranged from 63 per cent in Finland to 97 per cent in Sweden.[60] The case law of the ECJ has helped to draw greater attention to the fair interests of this particular group of workers. Indeed, improving the situation of part-time workers may also contribute to a better sharing of paid and unpaid work.

Indirect sex discrimination occurs where laws or agreements that appear to be gender-neutral and egalitarian actually have different effects on men and women, with statistical evidence showing that, say, many more female than male workers are excluded from certain payments, positions or benefits. Any rule or practice causing such effects is unlawful unless it can be justified on grounds unconnected with sex discrimination. Following a number of ECJ rulings, indirect discrimination is now defined in Article 2 (2) of Directive 97/80/EC which will come into force on 1 January 2001 (see Box 2 below).[61]

The Court's jurisprudence on pay in the context of part-time work and indirect discrimination started with the case of *Jenkins v. Kingsgate Ltd.*[62] Kingsgate, a clothing company, paid hourly rates to part-timers that were 10 per cent lower than those paid to full-timers; all part-time workers were women. Ms. Jenkins, who worked 75 per cent of the normal working time, brought an equal pay claim by comparing her hourly income with that of a full-time male employee. Even the employer agreed that the work they performed was identical. Considering her case to be one of indirect pay discrimination, the Court stated that: "A difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely *an indirect way of reducing the pay of part-time workers* on the ground that the group of workers is composed exclusively or predominantly of women". It made it clear, however, that such intent ought to be assumed because the same employer had previously paid all its female workers less.

The notion of indirect discrimination was further developed in *Bilka Kaufhaus v. Weber von Hartz*. Bilka belonged to a group of department stores which employed several thousand workers who normally joined the company's occupational pension scheme. Part-time workers, however, were contractually excluded from the scheme unless they had worked full time for at least 15 years. Ms. Weber von Hartz, who had worked for Bilka for 15 years — including four years part time — was denied an occupational pension. She sued the employer for indirect pay discrimination, arguing that almost all part-time workers were female. The Court regarded the benefits of the pension scheme as linked to employment and, therefore, "pay". Accordingly, it ruled that:

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[60] See OECD: *OECD Employment Outlook — June 1999*, Paris, OECD, 1999, p. 240, table E; and, more generally, http://europa/eu.int/en/comm/eurostat.

[61] In those areas covered by ECJ case law on equal pay, this definition applies already.

[62] Case 96/80, ECR 1981, p. 911. In view of the fact that Ms. Jenkins was able to substantiate her claim with concrete evidence of the income of a man who performed the same work, this could be regarded as a case of *direct* discrimination as well.

> 1. Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.
>
> 2. Under Article 119 a department store company may justify the adoption of a pay policy excluding part-time workers, irrespective of their sex, from its occupational pensions scheme on the ground that it seeks to employ as few part-time workers as possible where it is found that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.
>
> 3. Article 119 does not have the effect of requiring an employer to organise its occupational pension scheme in such a manner as to take into account the particular difficulties faced by persons with family responsibilities in meeting the conditions for entitlement to such a pension (Case 170/84, ECR 1986, p. 1607).

It was thus explicitly acknowledged that no intention of discrimination was required to regard a certain policy as illegal under European law. The following guidelines were used to tackle the problem of indirect discrimination: it is up to the claimant to show that a certain policy has negative effects on considerably more members of one sex than the other; the employer may justify its policy by *objective reasons* which appropriately respond to a *specific need* of the company, with respect not only to the *goals* pursued but also to the *commensurate means* employed; it is then up to the national court to determine whether the policy in question amounts to sex discrimination. Bilka was unable to justify its policy and had to change it.

The requirement of a strict test for objective justification based on necessity and proportionality was later extended to the negative effects of national legislation. Challenged in *Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH & Co. KG* was the legality of Germany's law on the continued payment of wages during illness, which obliged employers to pay sick leave for up to six weeks, but excluded part-time workers working less than ten hours per week or 45 hours per month. The large majority of the part-timers adversely affected were women. Ms. Rinner-Kühn, who normally worked ten hours per week, claimed pay for eight hours during which she was unable to work because she was sick. The Court held the statutory provision on the basis of which her claim was rejected to be contrary to Community law unless the German State could show that it was *justified by purely objective considerations*:

> Article 119 of the EEC Treaty must be interpreted as precluding national legislation which permits employers to exclude employees whose normal working hours do not exceed 10 hours a week or 45 hours a month from the continued payment of wages in the event of illness, if that measure affects a far greater number of women than men, unless the Member State shows that the legislation concerned is justified by objective factors unrelated to any discrimination on grounds of sex (Case 171/88, ECR 1989, p. 2743).

The national labour court which then resumed its consideration of the case did not accept the Government's argument, so the law had to be amended.

In *Kowalska v. Freie und Hansestadt Hamburg*,[63] the question was whether a collective agreement may allow employers to exclude part-time workers from a temporary benefit payable to full-timers on termination of their employment. In *Nimz v. Freie und Hansestadt Hamburg*,[64] the collective agreement contained a provision whereby part-timers took much longer to qualify for promotion to a higher salary range. Again, the disfavoured groups were predominantly women. The Court was unimpressed by the autonomy of the social partners. It pointed out that Article 119 of the Treaty was sufficiently clear and precise to be relied upon before a national court in order to set aside a discriminatory provision in a collective agreement.

A recent preliminary ruling dealt with an incremental credit determined on the basis of actual time worked in job-sharing situations. In *Hill and Stapleton v. The Revenue Commissioners and Department of Finance*,[65] two women participating in a job-sharing scheme challenged a rule whereby two years' job-sharing service counted as one year's full-time service, thus leading to slower progression on the pay scale. With women accounting for 98 per cent of all job-sharing contracts, the Court again concluded that such a rule was contrary to the principle of equal pay unless it could be justified by objective factors alone. In its reasoning, the Court stressed that about 83 per cent of the job-sharers used this option to better combine work and family responsibilities, and that Community policy in this area was to encourage such schemes and to protect women in the same way as men.

While some cases on occupational pensions have clearly served women's financial interests, this has not always been so. The *Barber* and so-called *post-Barber* cases,[66] dealing with the legality of different pensionable ages for women and men, have led to the loss of women's privileged position in this respect. The background to these cases was that, although Member States were allowed to determine different pensionable ages for women and men under state social security schemes,[67] a significant number of occupational pension schemes had taken up the same differentiation for employer-financed pensions as well.

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[63] Case C-33/89, ECR 1990, p. I-2591.

[64] Case C-184/89, ECR 1991, p. I-297.

[65] ECR 1998, p. I-3739; see also Case C-360/90, *Arbeiterwohlfahrt der Stadt Berlin eV v. Bötel,* ECR 1992, p. I-3589; Case C-297/93, *Grau-Hupka v. Stadtgemeinde Bremen,* ECR 1994, p. I-5535; Joined Cases C-399/92, C-409/92, C-34/93, C-50/93 and C-78/93, *Stadt Lengerich and Others v. Helmig and Others,* ECR 1994, I-5727; Case C-457/93, *Kuratorium für Dialyse und Nierentransplantation eV v. Lewark,* ECR 1996, p. I-243 (on part-time employees in the public service).

[66] Case 262/88, *Barber v. Guardian Royal Exchange Assurance Group,* ECR 1990, p. I-1889; other important cases in this context are C-110/91, *Moroni v. Collo GmbH,* ECR 1993, p. I-6591; C-152/91, *Neath v. Steeper Ltd,* ECR 1993, p. I-6935; C-200/91, *Coloroll Pension Trustees Limited v. Russell and Others,* ECR 1994, p. I-4389; C-408/92, *Smith and Others v. Avdel Systems Ltd,* ECR 1994, I-4435; C-147/95, *Dimossia Epicheirissi Ilektrismou (DEI) v. Evrenopoulos,* ECR 1997, p. I-2057.

[67] See Article 7, paragraph 1(a) of Directive 79/7/EEC.

Mr. Barber filed a lawsuit because he felt discriminated against due to the different minimum pensionable ages set for female and male workers. Under the applicable occupational pension scheme of the Guardian Royal Exchange Assurance Group, women were normally entitled to old-age pensions from the age of 57, and men from the age of 62. Former employees who were unemployed received benefits under the scheme from the age of 50 (women) or 55 (men). For a state pension, the pensionable ages were 60 for women and 65 for men. The occupational pension scheme was organized as a contracted-out scheme which replaced the state pension scheme and was primarily based on contributions from the employer.

Dismissed for organizational reasons at the age of 52, Mr. Barber claimed the occupational pension which his female colleagues in the same situation were entitled to receive. The case was referred to the ECJ, which held that occupational pension schemes resulting in higher accumulated benefits for female than for male pensioners were inconsistent with the right to equal pay. For reasons of legal certainty — as in *Defrenne II* — retroactive claims were limited to persons who had already taken steps to defend their rights before a court or tribunal. Other disadvantaged persons are entitled to retroactive claims from 17 May 1990, the date of the Barber judgement.

As a result of this ruling, a large number of occupational pension schemes had to be changed to incorporate the principle of equal pay, often with the involvement of the social partners. As long as there were no contractual agreements or provisions in place allowing the use of other criteria and until the new schemes were put in place, the hitherto disadvantaged group of men was entitled to the better treatment so far accorded to women (i.e. "levelling up").

The Court's ruling provoked intense discussion because the schemes had to be reorganized in a period of economic restraint, on the basis of cost-neutral calculations, which led to an unfavourable revision of pension rights for women workers. Nevertheless, the ruling was in line with the Court's logic of promoting *absolute equality* between women and men. It also makes sense from the point of view of equal labour market opportunities, which are certainly promoted through the equalization of non-wage labour costs.

Several "post-Barber" judgements have since dealt with more specific situations. Of particular relevance among these were two cases dealing, inter alia, with a Protocol annexed to the Maastricht Treaty which was meant to limit the effects of the Barber and post-Barber case law, namely:

> For the purposes of Article 119 of this Treaty, benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who have before that date initiated legal proceedings or introduced an equivalent claim under the applicable national law *(Protocol concerning Article 119 of the Treaty establishing the European Community).*

An ancillary question the Court had to answer was whether the limitation of effects in time — consequent upon the Barber judgement and this Protocol — also applied to workers unlawfully excluded from the benefits of an

occupational pension scheme. This was the case in *Dietz v. Stichting Thuiszorg Rotterdam*[68] and in *Magorrian and Cunningham v. Eastern Health and Social Services Board and Department of Health and Social Services*[69] — two cases in which the claimants were part-timers. Following its judgement on the Bilka case, the Court stated that in a case of indirect sex discrimination — which is up to the national court to determine — benefits from occupational pension schemes must be taken into account as from 8 April 1976 (the date of the judgement on *Defrenne II*), not from the date of the Barber judgement or any later date. A number of cases raising similar problems are still pending.[70]

The burden of proof and “work of equal value”

When a person files a legal complaint, it is in principle up to her or him to prove the facts of the alleged claim. The *burden of proof* is a procedural rule dealing with situations where, in the presentation of a case, an assertion is not clearly provable. The ECJ has developed a settled case law on the burden of proof in a number of important rulings on equal pay. The new directive on the burden of proof in sex discrimination cases (97/80/EC), due to come into force on 1 January 2001, extends the new rules on the burden of proof to situations covered by Article 119 EC Treaty (Article 141 EC) and by Directives 75/117/EEC, 76/207/EEC, 92/85/EEC and 96/34/EC (see Box 2).

In *Handels-ogKontorfunktionærernes Forbund i Danmark v. Dansk Arbejdgiverforening (acting on behalf of Danfoss)*,[71] there was statistical evidence that women working for that company averaged considerably lower earnings than men, though the reasons for the pay gap were unclear. It was ruled that where a system lacks transparency and a *prima facie* case of pay discrimination is made, the burden of proof shifts to the employer who can rebut the evidence by showing that the pay system is entirely gender-neutral.

Enderby v. Frenchay Area Health Authority[72] dealt with the pay system of the British public health service in which (mainly male) pharmacists received higher pay than speech therapists (who were mainly female) by virtue of two separately negotiated collective agreements. The Court ruled that their common employer had to abide by the principle of equal pay irrespective of the validity of the underlying bargaining processes. It also spelled out criteria for the possible justification of specific additional payments, such as seniority, special demand, flexibility, mobility, etc.

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[68] Case C-435/93, ECR 1996, p. I-5223.

[69] Case C-246/96, ECR 1997, p. I-7153.

[70] See *Equality Quarterly News* (http://europe.eu.int/comm/dg05/equ_opp/index_en.htm), No. 2/99, on Case C-50/96 *(Schröder)*; on Case C-78/98 *(Preston and Others v. Wolverhampton and Others)*, see the Advocate General’s recently delivered opinion in ECJ Press release No. 64/99 (http://curia.eu.int/en/cp/cp9964en. htm).

[71] Case 109/88, ECR 1989, p. 3199.

[72] Case C-127/92, ECR 1993, p. I-5535; see also Case C-400/93, *Specialarbejderforbundet i Danmark v. Dansk Industri, formerly Industriens Arbeijdgivere, acting for Royal Copenhagen A/S,* ECR 1995, p. I-1275.

Box 2. Excerpt from the Directive on the burden of proof in sex discrimination cases (97/80/EC)

Article 1
Aim

The aim of this Directive shall be to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.

Article 2
Definitions

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no discrimination whatsoever based on sex, either directly or indirectly.

2. For purposes of the principle of equal treatment referred to in paragraph 1, indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Article 3
Scope

1. This Directive shall apply to:

(a) the situations covered by Article 119 of the Treaty and by Directives 75/117/EEC, 76/207/EEC and, insofar as discrimination based on sex is concerned, 92/85/EEC and 96/34/EC; ...

Article 4
Burden of proof

1. Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. ...

In May 1999, the Court delivered a ruling on psychotherapists with different training and qualifications employed by the same institution. In *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebiets-krankenkasse*,[73] it held that the employer is not obliged to pay the same salaries to persons who perform seemingly identical tasks but who draw upon knowledge and skills acquired in different disciplines and who do not have the same qualifications to perform other tasks that may be assigned to them. Further interpretation of "work of equal value" can be expected in the pending *Svenaeus* case,[74] where the question asked is whether the same value can be assigned to the work of a midwife and that of a clinical technician.

[73] Case C-309/97 (nyr), ruling of 11 May 1999; see ECJ Press Release No. 29/99 (http://curia.eu.int/en).

[74] Case C-236/98, *Jämställdhetsombudsmannen Lena Svenaeus,* OJ 98/C 278/32 (pending).

Discrimination based on sex under the Equal Treatment Directive

The principle of equal treatment, as laid down in Article 2(1) of the Equal Treatment Directive (76/207/EEC), requires that there be "no discrimination on the grounds of sex either directly or indirectly by reference in particular to marital or family status". About one-third of the ECJ's rulings on equality matters have dealt primarily or solely with the interpretation of this Directive. Some of the rulings have had little practical relevance, but are nevertheless noteworthy because they reflect the Court's perception of sexual self-determination.

In *P. v. S. and Cornwall County Council*,[75] the dismissal of a transsexual was questioned. This dismissal was regarded as "based on sex" and therefore contradictory to Article 5(1) of Directive 76/207/EEC. Another reference for preliminary ruling concerned the legality of a national policy of discharging from the armed forces any person of homosexual orientation.[76] This would have been an opportunity to clarify whether sexual orientation can, in terms of equal treatment, be seen differently from what the Court decided in the above-mentioned *Grant* case, but the case was withdrawn.

Most of the equal treatment cases have improved the situation of a large majority of working women by defining discrimination in the context of pregnancy, affirmative action, part-time work, night work, and work with weapons, as well as the consequences of violations of the right to equal treatment.

Direct discrimination associated with pregnancy and maternity

It is settled ECJ case law that the dismissal of a female worker on account of pregnancy constitutes direct discrimination on grounds of sex.[77] This held even for the dismissal of a pregnant women who had originally been employed, under a contract of unlimited duration, to replace an employee on maternity leave.[78]

Since the Court's ruling on *Dekker v. VJV-Centrum Plus*,[79] it is also established that an employer who refuses to engage a woman because she is pregnant commits an act of direct discrimination. In this case, the job was given to

[75] Case C-13/94, ECR 1996, p. I-2143.

[76] Case C-168/97, *The Queen v. the Secretary of State for Defence, ex parte: Perkins* (withdrawn), OJ 97/C 199/22; since the scope of sex equality is wider under Directive 76/207/ EEC than it is in the context of equal pay , a more generous interpretation than in the *Grant* Case (see note 54 above) would have been possible.

[77] See Case 179/88, *Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening (Hertz v. Aldi),* ECR 1990, p. I-3979; C-421/92, *Habermann-Beltermann v. Arbeiterwohlfahrt, Bezirksverband Ndb./Opf.e.V.,* ECR 1994, p. I-1657.

[78] Case C-32/93, *Webb v. EMO Air Cargo (UK) Ltd,* ECR 1994, p. I-3567.

[79] Case 177/88, ECR 1990, p. I-3941.

another woman, so the question that came up was whether one could speak of sex discrimination if the successful applicant was also a woman. The Court answered with a resounding "yes": since the basis for rejection of the job application was a criterion which could only affect women, direct discrimination was clearly present without any need for comparison.

The pending *Silke* case[80] is about whether an employer may refuse an applicant for a permanent post which she is qualified to hold, because she is pregnant and cannot *from the outset and for the duration of her pregnancy* do the specific work required because of a prohibition under maternity law.

The Court's position on the consequences of pregnancy-related sick leave has been inconsistent. In the case of *Ms. Hertz*,[81] it argued that the Directive did not envisage "illness attributable to pregnancy" and therefore did not preclude dismissal on grounds of absences due to such illness. This interpretation was confirmed in the case of *Ms. Larsson*,[82] but was later reversed in *Brown v. Rentokil Ltd*.[83] It is now established that even if a contractual agreement permits dismissal after a certain period of absence, absence in connection with pregnancy does not count:

> Articles 2(1) and 5(1) of Council Directive 76/207/EEC of 9 February 1996, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, preclude dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by illness resulting from that pregnancy. The fact that a female worker has been dismissed during her pregnancy on the basis of a contractual term providing that the employer may dismiss employees of either sex after a stipulated number of weeks of continuous absence does not affect the answer given (Case C-394/96, ECR 1998, p. I-4185).

In 1998 the Court ruled upon the important issue of performance assessment in the context of motherhood: *Ms. Thibault*[84] had been employed by *CNAVTS* since 1973; during her pregnancy in spring 1983, she was absent for a few weeks on account of sickness; and from June to November, she took paid maternity leave for 16 weeks, followed by maternity leave on half pay for a further six weeks (such maternity leave being provided for under the applicable collective agreement). Her employer subsequently refused to carry out an assessment of her performance for that year, because she did not meet the relevant contractual condition of at least six months' presence at work.

[80] Case C-207/98, OJ 98/C 234/21 (pending).

[81] Case 179/88 (see note 77 above).

[82] Case C-400/95, *Handels- og Kontorfunktionærernes Forbund i Danmark (acting on behalf of Larsson) v. Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S,* ECR 1997, p. I-2757.

[83] Case C-394/96, ECR 1998, p. I-4185; on payment of wages during pregnancy-related illness, see note 58 above.

[84] Case C-136/95, *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v. Thibault,* ECR 1998, p. I-2011.

The Court, requested to comment on the legitimacy of the employer's refusal, stressed the importance of regular performance assessment for career development. Denial of the performance assessment would therefore discriminate against the claimant merely because she had been pregnant and made use of the maternity leave to which she was entitled:

> Articles 2(3) and 5(1) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions preclude national rules which deprive a women of the right to an assessment of her performance and, consequently, to the possibility of qualifying for promotion because she was absent from the undertaking on account of maternity leave (Case C-136/95, ECR 1998, p. I-2011).

Unequal treatment of part-time workers[85]

The Equal Treatment Directive generally has no direct effect under national law, but it can be invoked against the State if the employer is a public body or institution.[86] As shown above, the Court has usually interpreted the right to equal pay extensively, thus leaving relatively few cases to equal treatment. A considerable number of judgements have therefore dealt with unequal treatment of part-time public servants. These cases are highly relevant in practice because a large majority of part-time workers in public services are female.

In *Gerster v. Freistaat Bayern*[87] the issue was a provision requiring that, in calculating length of service, periods of employment be reckoned less favourably for part-timers. *Kording v. Senator für Finanzen Bremen*[88] centred on the application of the national Tax Consultancy Act, which required a minimum of 15 years' professional experience in a revenue office to qualify for admission to the profession of tax consultant without an examination. For part-time employees, this provision was interpreted to mean that the minimum period should be prolonged depending on actual time worked. In both cases, the underlying rationale for these practices was an alleged special link between length of service and acquisition of a certain level of knowledge or experience. The Court saw this as too general an assumption, which could not be justified by entirely gender-neutral criteria. In both cases, more than 90 per cent of those adversely affected were women.

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[85] For recent data on women in part-time employment, including the public sector, see OECD: *The future of female-dominated occupations,* Paris, OECD, 1998, p. 24 et seq. and 96 et seq.; see also Jill Rubery and Colette Fagan (in association with Claire Faichnie, Damian Grimshaw and Mark Smith): *Equal opportunities and employment in the European Union*, Vienna, Federal Ministry of Labour, Health and Social Affairs, 1998, Chapter 2.

[86] See Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching),* ECR 1986, p. 723; this case did not involve a part-time worker, but a woman who had been dismissed only because she had reached the pensionable age which was interpreted as discriminatory under Directive 76/207/EEC; see also case C-188/89, *Foster and Others v. British Gas,* ECR 1990, p. I-3313.

[87] Case C-1/95, ECR 1997, p. I-5253.

[88] Case C-100/95, ECR 1997, p. I-5289.

Affirmative action in favour of women — discrimination against men?

Two highly disputed rulings have been delivered on the legality of affirmative-action policies. Both cases dealt with national provisions on recruitment and promotion in the public sector which gave preference to women under certain conditions.

The first ruling was on the case of *Kalanke v. Freie Hansestadt Bremen*.[89] Mr. Kalanke had applied for a higher post, but the public authority concerned gave priority to a woman, citing legislation of the Land of Bremen which aimed at increasing the proportion of female employees, especially in higher positions. This law stipulated that in recruitment or promotion procedures, where a female has the same qualification as a male candidate, the woman should be given preference *generally and automatically*, as long as women are under-represented at that level. Having failed to be promoted on account of this law, Mr. Kalanke challenged its validity before the national court, claiming to have been discriminated against. The provision at issue was found to be compatible with German law, but the question of its conformity with Directive 76/207/EEC was referred to the ECJ. The Court held that the provision contained *direct* discrimination against men which was not justified by the nature of the job or the context in which it was carried out, as provided for under Article 2(2) of the Directive:

> Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions precludes national rules such as those in the present case which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organisation chart (Case C-450/93, ECJ 1995, p. I-3051).

The Court argued that Article 2(4), which provides that the Directive "shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities", was a *derogation* from the individual right to equality set out in the first paragraph of the same Article. Whereas the principle of equality required extensive interpretation, exceptions from this principle were to be interpreted strictly. In the Court's view, paragraph 4 was specifically and exclusively designed to authorize measures which, although discriminatory in appearance, were in fact intended to eliminate or reduce instances of inequality which may exist in the reality of social life. National rules which guarantee absolute and unconditional priority under the conditions mentioned went beyond promoting equal opportunities and overstepped the limits of possible exceptions to the principle of equality.

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[89] Case C-450/93, *Kalanke v. Freie Hansestadt Bremen,* ECR 1995, p. I-3051.

In 1997 the ECJ delivered its second judgement on quota policies in the case of *Marshall v. Land Nordrhein-Westfalen*.[90] Mr. Marshall challenged a similar rule of the Land's Civil Servants Act, with the difference that reasons specific to an individual (male) candidate could "tilt the balance in his favour". This time the Court ruled that a national law which gives priority to equally qualified women does not conflict with Community law as long as women are under-represented in the given area of work and the male competitor is not excluded from the outset.

In its reasoning, it stressed that certain deep-rooted prejudices and stereotypes as to the roles and capacities of women in working life still persist. If national legislation gives priority to women for a transitional period with the aim of restoring the balance, such legislation does not contradict Directive 76/207/EEC provided that an objective assessment of each individual candidate in question is assured. Now most of the affirmative action policies in force throughout Europe must be considered compatible with European law.[91]

Two preliminary rulings on affirmative action are still pending. In the *Anderson* case,[92] the Court is requested to rule on its precise limits. For example, does conformity with the Directive require that candidates' qualifications be entirely equal? Or are quota policies permissible even when the female candidate's qualifications are judged lower than those of her male counterpart, but still considered sufficient for the post? The second pending case — that of *Badeck and Others v. Hessischer Ministerpräsident*[93] — deals with targets in a women's advancement plan for posts in the academic field.

Exclusion from certain types of work: Armed service and night work

Protection of women might have negative repercussions on their participation and opportunities in the labour market. The exclusion of women from certain types of work is an important and topical issue, because perceptions of women's presence in formerly "male" occupations are undergoing societal changes.

The case of *Johnston v. Chief Constable of the Royal Ulster Constabulary (RUC)* dealt with a woman whose contract of employment was not renewed after the RUC introduced the carrying of firearms in the police service. The ECJ was called upon to rule, inter alia, on the scope of Article 2(3) of Directive

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[90] Case C-409/95, *Marshall v. Land Nordrhein-Westfalen* , ECR 1997, p. I-6363.

[91] See *Communication from the Commission to the European Parliament and the Council on the interpretation of the judgement of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v. Freie Hansestadt Bremen*, 27.3.1996, COM(96)88 final; see also European Commission Press Release: *Statement by Commissioner Flynn on the Marschall Case,* 11 November 1997 (http://europe.eu.int).

[92] Case C-407/98, *Abrahamsson and Anderson v. Fogelqvist,* OJ 99/C 1/10 (pending); on the basis of the argument in the *Marschall* case, such a provision is hardly acceptable.

[93] Case C-158/97, *Badeck and Others v. Hessischer Ministerpräsident and Landesanwalt beim Staatsgerichtshof des Landes Hessen,* OJ 97/C 199/20 (pending).

76/207/EEC, which allows certain measures to protect women. The Court emphasized that this provision, as an exception from the principle of equality, had to be interpreted strictly so that the general exclusion of women was unjustified: "The differences in treatment of men and women that Article 2(3) of Directive No 76/207 allows out of a concern to protect women do not include risks and danger, such as those to which any armed police officer is exposed in the performance of his duties in a given situation, that do not specifically affect women as such" (Case 222/84, ECR 1986, p. 1651).

Political issues of major relevance are currently pending before the Court. The question in both of the following cases is whether defence is a sector within the exclusive competence of the Member States or whether it is also subject to the principle of equality and, if so, to what extent. In other words: Is it the sovereign prerogative of the national state to allow only males to join the armed forces?

Ms. Kreil[94] claims eligibility for work as a technician in the armed forces of Germany. But according to Germany's Armed Forces Act, women who enlist as volunteers may be appointed only to duties in the medical and military-music services and are excluded in any event from armed service. The Advocate General's opinion on the case suggests that this general exclusion be declared incompatible with the Equal Treatment Directive. *Ms. Sirdar*[95] claims access to service as a cook in the Royal Marines of the United Kingdom. She had been employed as a cook in the British Army since 1983 and was assigned to the Royal Artillery in 1990. After receiving notice of redundancy in 1994, she submitted a request to be transferred to the position of cook in the Royal Marines. But this request was rejected on the grounds that this corps did not admit female employees.

On the latter case, the Advocate General recently stressed that requirements imposed in the interest of national defence must be seen in the light of *proportionality.* The arguments of governments, according to which defence should remain within the exclusive competence of the Member States, were unfounded, and Community law therefore applies. He stressed that the nature of military activities was not sufficient in itself to permit such an exemption. In its ruling of 26 October 1999,[96] the Court confirmed that the principle of equal treatment generally applied to the armed forces as well, though the exclusion of women from the Royal Marines was accepted because that particular corps differed fundamentally in organization from other units of the British armed forces.

The issue of night work, first raised in the case of *Mr. Stoeckel*,[97] implies a conflict between the international labour standards of the ILO and supranational

[94] On Case C-285/98, *Kreil v. Federal Republic of Germany,* see ECJ Press Release No. 84/99 (http://curia.eu.int).

[95] On Case C-273/97, *Sirdar v. The Army Board and Secretary of State for Defence,* judgement of 26 October 1999 (nyr), see ECJ Press Release No. 83/99 (http://curia.eu.int).

[96] See note 95.

[97] Case C-345/89, *Ministère Public v. Stoeckel,* ECR 1991, p. I-4047.

European law. The question in the case in point was whether a national provision banning women from night work — in accordance with the ILO's Night Work (Women) Convention (Revised), 1948 (No. 89) — was in compliance with European equality law.

Mr. Stoeckel had been sentenced by a French court because he had employed women for night work in breach of Article L 213-1 of the French Labour Code. But the ECJ held that the general ban on night work for women was discriminatory, and that the principle of equal treatment required that women, except during pregnancy and maternity, should also have the option of working at night. However, it avoided comment on the relationship between international and supranational European law, although the statutory provision at issue had been adopted to comply with the ILO Convention prohibiting women from night work, which France had ratified:

> Article 5 of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions is sufficiently precise to impose on the Member States the obligation not to lay down by legislation the principle that night work by women is prohibited, even if that obligation is subject to exceptions, where night work for men is not prohibited (Case C-345/89, ECR 1991, p. I-4047).

France maintained Article L 213-1 of its Labour Code unchanged, which led to infringement.[98] Indeed, following the French Government's denunciation of ILO Convention No. 89, the French legislation was undisputably incompatible with European law. Although France had declared it did not apply the contentious provision because it was null and void, in its judgement of 1997 the Court ruled that France had failed to fulfil its obligations under Article 5(1) of Directive 76/207. It commented that while the article was in existence, individuals were unsure of their legal situation and exposed to unwarranted criminal proceedings. Incompatibility of national legislation with Community law could be finally remedied *only by binding national provisions having the same legal force as those which had to be amended.* A similar case was successfully brought against Italy.[99]

Still, neither France nor Italy has amended its legislation; and infringement proceedings have now been instituted under Article 228 EC (ex Article 171 EC Treaty),[100] which may lead to sanctions. The European Commission recently asked the ECJ to impose a daily fine of 142,425 Euros on France for non-implementation of its earlier judgement.[101]

[98] Case C-197/96, *Commission of the European Communities v. French Republic,* ECR 1997, p. I-1489.

[99] Case C-207/96, *Commission of the European Communities v. Italian Republic,* ECR 1997, p. I-6869.

[100] See *Equality Quarterly News* (http://europe.eu.int/comm/dg05/equ_opp/index_en.htm), No. 2/99.

[101] See note 32 above.

The effet utile: *Enforcement through effective remedies and sanctions*

If the right to equal pay has been violated, the claimant is entitled to retroactive pay; but what is the redress for violations of the right to equal treatment? The Court has developed a convincing body of case law whereby, in dealing with the implementation of directives, national states are, in principle, free to choose the form of sanctions. Remedies and sanctions must, however, be effective both in protecting against discrimination and in compensating for the harm or loss suffered as a consequence of a breach of law; this principle is called the *"effet utile"*.

The first cases on the *effet utile* were *Von Colson and Kammann v. Land Nordrhein-Westfalen*[102] and *Harz v. Deutsche Tradax GmbH.*[103] The female claimants had applied for jobs and were obviously rejected because of their sex. Their claim was to be appointed to the respective posts or to receive adequate compensation. German law provided compensation only for mailing or other minor expenditure incurred in connection with applying for the job. The Court held that it was up to national law to determine whether redress was provided by appointment to the job or by compensation, but if *compensation* is chosen, it must be an effective deterrent and adequate to make good the damage suffered:

> Although Directive 76/207/EEC, for the purpose of imposing a sanction for the breach of the prohibition of discrimination, leaves Member States free to choose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chooses to penalise breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application. It is for the national court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law (Case 14/83, ECR 1984, p. 1891).

A subsequent amendment to Germany's Civil Code set a ceiling of three months' pay on individual awards of compensation and an aggregate limit of six months' pay where compensation was claimed by several parties; it furthermore required an individual fault on the part of the employer. *Mr. Draehmpaehl*,[104] whose application had been turned down for a post advertised only for female assistants, challenged its legality. The Court rejected the requirement of a *fault* on the part of the employer. In cases where the claimant would have obtained the vacant position, the ceiling of three months' pay was

[102] Case 14/83, ECR 1984, p. 1891.

[103] Case 79/83, ECR 1984, p. 1921.

[104] Case C-180//95, *Draehmpaehl v. Urania Immobilienservice OHG,* ECR 1997, p. I-2195.

interpreted as incompatible with the Directive. The ceiling for the aggregate amount of compensation was regarded as illegal unless comparable ceilings existed in other provisions of domestic law:

> Directive 76/207/EEC precludes provisions of domestic law which, unlike other provisions of domestic civil and labour law, impose a ceiling of six months' salary on the aggregate amount of compensation which, where several applicants claim compensation, may be claimed by applicants who have been discriminated against on grounds of their sex in the making of an appointment (Case C-180/95, ECR 1997, p. I-2195).

Concluding remarks

As this article has shown, European legislation and case law have given new momentum to legal equality between women and men by contributing substantially to respect for the principle of equal pay for work of equal value and to the elimination of discrimination — both direct and indirect — in regard to eligibility for particular occupations, part-time work, night work, pensions, pregnancy and maternity. Their unique supranational character has led to the revision of domestic law in all Member States, thus stimulating a new way of thinking. The European Court of Justice has not confined its interpretations to the principle of "judicial self-restraint" and has thereby rendered European equality law more effective in testing national rules and practice. Workers who have had the courage to challenge unfavourable decisions, as well as judges, lawyers and other experts — who have become increasingly aware of supranational instruments and willing to use them — have contributed to this development. The challenge is ultimately to utilize these instruments to achieve full equality at the workplace in practice.